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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

I.

A RECENT DISPUTE WITHIN THE SEVENTH CIRCUIT FURTHER ILLUSTRATES WHY *FALCONER* ANNOUNCED A NEW RULE.

Although Taylor apparently elected not to mention it in his Brief in Opposition, Judge Easterbrook's separate opinion in the latest Seventh Circuit case addressing the constitutionality of the pattern jury instructions here at issue strongly supports the points presented in the Petition for Certiorari.

In *Flowers v. Illinois Department of Corrections*, 962 F.2d 703 (7th Cir.), *petition for cert. filed* (Aug. 5, 1992) (No. 92-253), the Seventh Circuit relied on the decision

below to hold that *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), announced an old rule that it could apply retroactively. *Flowers*, 962 F.2d at 705. Judge Easterbrook concurred, however. He conceded that stare decisis required the court to follow existing Seventh Circuit precedent, but he wrote that he "would not have decided *Falconer* and *Taylor* [*i.e.*, the decision below] in the same way." 962 F.2d at 707 (Easterbrook, J., concurring).

Judge Easterbrook wrote that the instructions do not violate the Due Process Clause essentially for the same reasons presented in Gilmore's Petition. He explained: "[I]f a state could choose to do something—choose, for example, to make self-defense an affirmative defense to murder . . .—then the federal inquiry is over; whether the state has indeed so chosen is a question of its domestic law." *Id.* at 711 (citing *Patterson v. New York*, 432 U.S. 197 (1977), and *Martin v. Ohio*, 480 U.S. 228 (1987)). Although some panels of the Seventh Circuit believe that errors under *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), violate the Due Process Clause, Judge Easterbrook does not. As a "reasonable jurist[ ]," Judge Easterbrook's concurrence in *Flowers* necessarily means that the lower court's restatement of *Falconer's* rationale established a new rule of criminal procedure. *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822, 2827 (1990).

II.

THE RESPONDENT HAS CONCEDED ALL THE REASONS PRESENTED IN THE PETITION FOR GRANTING A WRIT OF CERTIORARI.

The Brief in Opposition disputes none of the specific legal claims in the Petition. Indeed, Taylor does not contest that both state and federal courts have fundamentally disagreed over the constitutionality of the pattern instructions; that *Falconer*, coupled with the lower court's restatement of *Falconer's* rationale, radically and unpredictably extended criminal defendants' Due Process rights by effectively requiring correct jury instructions on affirmative defenses provided by state law; and that a circuit conflict exists over this extension of the Due Process Clause. Because Taylor did not respond to these reasons for granting the writ of certiorari in his Brief in Opposition, he has waived any challenge to these points. *City of Canton v. Harris*, 489 U.S. 378, 383-85 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

III.

THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS AMPLY PRESERVED IN THE LOWER COURTS.

Taylor argues essentially that the Court should not grant certiorari on the first question presented in the Petition because the law collaterally estops Gilmore from raising the question. Taylor's argument conflicts with long-accepted principles of collateral estoppel, so the Court should reject it.

Taylor argues that "the State of Illinois" elected not to raise, in certain earlier cases,[1] the legal issue of whether *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), applies retroactively on habeas corpus review. He concludes that the Court should not grant certiorari to resolve the question in this case, even though the question of retroactivity was raised and resolved on its merits in this case in the federal district court and the Seventh Circuit.

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[1] Taylor mischaracterizes the parties to these other cases. The "State of Illinois" was not a party to any of the habeas corpus actions to which Taylor refers. In each of those cases, the respondent was an Illinois Department of Corrections official.

A litigant has no obligation, however, to raise every available legal issue in every lawsuit. The Court has repeatedly held that collateral estoppel does not bar litigation of an issue that a party could have presented in an earlier case but elected not to raise for whatever reason. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 597 (1962) (Goldblatt's victory in the first suit brought on one ground did not bar the town from presenting a different theory of recovery in a later suit); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 669-70 (1944) (election not to raise a defense in an earlier action did not preclude raising it in a later suit).

Furthermore, the logic of Taylor's argument would lead to absurd results. Taylor would have this Court forever foreclose the possibility of certiorari review of an issue just because a party did not raise the issue in the first possible case that permitted it. A party, however, should have discretion to decide not to raise an issue without worrying that it might be foreclosed from presenting it to this Court in a later, unrelated case. Parties, especially state parties in habeas corpus cases, decide what issues to raise in lawsuits based on many different considerations; the law of collateral estoppel should not compel them to raise every possible issue in every case.

Moreover, Taylor's secondary argument, that applying *Teague v. Lane*, 489 U.S. 288 (1989), to *Falconer* would violate *Teague*'s policy of treating similarly situated defendants the same, is puzzling at best. Respondent's Brief in Opposition, pp. 4-5. *Teague* indeed states that the retroactivity doctrine should treat similarly situated prisoners the same. 489 U.S. at 304. The various state respondents' decisions not to press a *Teague* claim in some earlier *Reddick* error habeas corpus cases, however, did not alter this policy of the retroactivity doctrine. The *law* still treats

similarly situated habeas petitioners similarly; those earlier state respondents simply did not assert all their legal rights.

Taylor also argues that "[g]ranting this Petition would open the door to a defendant's claim that the State had an 'improper motive' in singling him out for a *Teague v. Lane* claim." Respondent's Brief in Opposition, p. 6 (citing *Wade v. United States*, 112 S. Ct. 1840 (1992)). *Wade*, however, suggests the opposite result. In *Wade*, the Court held that Wade had made no "substantial threshold showing" that the government had violated his constitutional rights by refusing to seek a downward departure from the federal sentencing guidelines based on an improper motive. 112 S. Ct. at 1844. Even if a state employee can violate a habeas petitioner's constitutional rights by asserting a *Teague* defense based on an improper motive (which this Court has apparently never held), Taylor, like Wade, has presented no substantial threshold showing that Gilmore acted with any improper motive.

Finally, Taylor asserts that Gilmore did not preserve below the Petition's first question presented because Gilmore conceded that the pattern jury instructions violated the federal constitution. The first question presented, however, does not raise the constitutionality of the instructions. Rather, it asks the Court to decide whether *Falconer*, which (as modified by the decision below) radically expanded an already controversial proposition on a fundamental aspect of criminal procedure, applies retroactively. Contrary to Taylor's argument, the Petition points to a circuit split only as evidence that "reasonable jurists may disagree" over the constitutionality of the instructions, and that therefore *Falconer* and the decision below announced a new rule under *Teague*. *Sawyer v. Smith*, 110 S. Ct. at 2827.

CONCLUSION

Judge Easterbrook's concurrence in the latest case to address *Reddick* errors further illustrates that *Falconer*, as modified by the decision below, announced a new rule of criminal procedure. The Brief in Opposition presents no sound reason to deny a writ of certiorari on this issue. This Court should grant the writ.

Respectfully submitted,

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